Minister of Human Resources & Ors v National Union of Hotel, Bar and Restaurant Workers, Semenanjung Malaysia and another appeal

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NOS W-01-45 OF 1995 AND W-02-418 OF 1995
GOPAL SRI RAM, ABDUL MALEK AHMAD AND AHMAD FAIRUZ JJCA
3 AND 4 JULY 1997

Labour Law *— Trade union — Recognition — Union requested for a membership verification to determine percentage of its membership among workmen of employer — Director General of Trade Unions decided to conduct secret ballot — Whether method adopted was unfair — Trade Unions Regulations 1959 regs 65(1) & (2)*

Administrative Law *— Remedies — Certiorari and mandamus — Union requested for a membership verification to determine percentage of its membership among workmen of employer — Director General of Trade Unions decided to conduct secret ballot instead of membership verification without giving any reasons — Whether Director General in deciding without giving reasons acted unreasonably — Effect of absence of reasons for a decision*

The two appeals here arose from a claim by the National Union of Hotel, Bar and Restaurant Workers, Semenanjung Malaysia ('the Union') to represent, in collective bargaining, such of its members who were employed by The Regent Kuala Lumpur ('the Hotel'). On 9 March 1993 the Union prepared and submitted Form A to the Hotel as prescribed by the Industrial Relations Regulations 1980 to obtain recognition for itself. The Hotel then wrote to the Director General of Industrial Relations ('the DGIR') requesting for a secret ballot to be held whereupon the DGIR wrote to the Director General of Trade Unions ('the DGTU') requesting the DGTU to carry out a membership check for the purpose of determining the percentage of the Union's membership among the workmen of the Hotel. The Union later wrote to the DGTU informing him that it wanted to have the percentage of its membership with the Hotel ascertained by means of a membership verification exercise pursuant to reg 65(1) of the Trade Unions Regulations 1959 ('the Regulations'). The DGTU, however, without giving any reasons, informed the Union and the Hotel that he had decided to make his determination by means of a secret ballot as prescribed by reg 65(2) of the Regulations. The secret ballot was subsequently conducted in the presence of both parties, with the Union representative entering a protest. The secret ballot revealed a percentage of 37.48% which was insufficient to support the Union's claim for recognition by the Hotel. Upon the matter being referred to the Minister of Human Resources ('the Minister'), he rejected the Union's claim for recognition. The Union, being dissatisfied with the Minister's decision, applied for an order of certiorari to quash that decision and for a mandamus directing the Minister, the DGIR and the DGTU to conduct a membership verification exercise under reg 65(1) of the Regulations. The High

Court granted the order principally on the ground that the DGTU had not given reasons for selecting the secret ballot method. On appeal to the Court of Appeal, counsel for the appellants contended that: (i) the decision of the DGTU to make his determination by resorting to the secret ballot was a reasonable decision and was not tainted with '*Wednesbury* unreasonableness'; and (ii) the judge was wrong in striking down the Minister's decision merely because the DGTU had failed to give reasons for making the choice that he did.

Held, allowing the appeal:

(1) There was, on the facts of this case, no unfair or unjust result by the application of the secret ballot method prescribed by reg 65(2) of the Regulations. It was clear that there was no unreasonable decision in the *Wednesbury* sense in this case. The DGTU had left it to the Hotel's workmen to decide whether they wished the Union to represent them in collective bargaining. The workmen announced their decision in a democratic fashion (see pp 383H and 384A, F–G).

(2) The absence of reasons for a decision where there was no duty to give them could not of itself provide any support for the suggested irrationality of the decision. The judge ought to have asked himself the question whether the DGTU's decision was unreasonable. Having done so, and if he had given an affirmative answer, then, and then only, ought he to have proceeded to consider the materiality or relevance of the failure on the part of the DGTU to provide reasons. Since the judge did not adopt this approach, his conclusions were fatally flawed by a misdirection on his part (see pp 384H–I and 385A–C); *Lonrho plc v Secretary of State for Trade and Industry* [1989] 2 All ER 609 followed.

[Bahasa Malaysia summary

Kedua-dua rayuan di sini timbul daripada suatu tuntutan oleh Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restoran, Semenanjung Malaysia ('Kesatuan tersebut') bagi mewakili, dalam perundingan kolektif, ahli-ahlinya yang digaji oleh The Regent Kuala Lumpur ('Hotel tersebut'). Pada 9 Mac 1993 Kesatuan tersebut menyediakan dan menyerahkan Borang A kepada Hotel tersebut sebagaimana yang ditetapkan oleh Peraturan Perhubungan Perindustrian 1980 bagi memperolehi pengiktirafan untuk dirinya. Hotel tersebut kemudiannya menulis kepada Ketua Pengarah Perhubungan Perindustrian ('KPPP') meminta supaya suatu undi sulit diadakan di mana KPPP telah menulis kepada Ketua Pengarah Kesatuan Sekerja ('KPKS') meminta KPKS supaya menjalankan satu pemeriksaan keahlian bagi tujuan menentukan peratusan keahlian Kesatuan tersebut di antara pekerja-pekerja Hotel tersebut. Kesatuan tersebut kemudiannya menulis kepada KPKS memaklumkan bahawa ia ingin memastikan peratusan keahliannya dengan Hotel tersebut melalui latihan pengesahan keahlian menurut peraturan 65(1)

Peraturan-Peraturan Kesatuan Sekerja 1959 ('Peraturan tersebut'). Namun begitu, tanpa memberi sebarang alasan KPKS memaklumkan kepada Kesatuan dan Hotel tersebut bahawa dia telah memutuskan untuk membuat penentuan secara undi sulit seperti yang ditetapkan oleh peraturan 65(2) Peraturan tersebut. Undi sulit itu kemudiannya dijalankan dalam kehadiran kedua-dua pihak, di mana wakil Kesatuan tersebut memasukkan bantahan. Undi sulit menunjukkan keahlian sebanyak 37.48% yang tidak mencukupi bagi menyokong tuntutan Kesatuan tersebut untuk pengiktirafan oleh Hotel tersebut. Apabila perkara itu dirujuk kepada Menteri Sumber Manusia ('Menteri'), beliau menolak tuntutan Kesatuan tersebut untuk pengiktirafan. Kesatuan tersebut, yang tidak berpuas hati dengan keputusan Menteri, membuat permohonan untuk perintah certiorari bagi membatalkan keputusan itu dan untuk mandamus yang mengarah Menteri, KPPP dan KPKS supaya menjalankan suatu latihan pengesahan keahlian di bawah peraturan 65(1) Peraturan tersebut. Mahkamah Tinggi membenarkan perintah itu terutamanya atas alasan bahawa KPKS telah tidak memberi alasan dalam memilih cara undi sulit. Atas rayuan kepada Mahkamah Rayuan, peguam untuk perayu-perayu berhujah bahawa: (i) keputusan KPKS untuk membuat penentuan dengan menggunakan undi sulit adalah keputusan munasabah dan tidak dicemari dengan 'ketidakmunasabahan *Wednesbury*'; dan (ii) hakim adalah salah dalam membatalkan keputusan Menteri semata-mata kerana KPKS telah gagal memberi alasan dalam membuat pilihan sedemikian.

Diputuskan, membenarkan rayuan:

(1) Atas fakta kes ini, tiada keputusan yang tak saksama atau tak patut akibat pemakaian cara undi sulit yang ditetapkan oleh peraturan 65(2) Peraturan tersebut. Adalah jelas bahawa tiada keputusan yang tidak munasabah dalam ertikata *Wednesbury* dalam kes ini. KPKS telah membiarkan pekerja Hotel tersebut untuk menentukan sama ada mereka ingin Kestauan tersebut mewakili mereka dalam perundingan kolektif. Pekerja mengumumkan keputusan mereka dalam cara yang demokratik (lihat ms 383H dan 384A, F–G).

(2) Ketiadaan alasan untuk satu keputusan di mana tiada kewajipan untuk memberinya tidak secara sendirinya menyediakan sebarang sokongan bagi keadaan yang tidak rasional atas keputusan. Hakim sepatutnya bertanya diri persoalan sama ada keputusan KPKS adalah tidak munasabah. Selepas berbuat demikian, dan jika beliau telah memberi jawapan 'ya', barulah beliau boleh terus mempertimbangkan kepentingan atau kerelevanan kegagalan pada pihak KPKS untuk memberi alasan. Oleh kerana hakim tidak menerimapakai pendekatan ini, kesimpulannya adalah cacat akibat salah arah pada pihak beliau (lihat ms 384H–I dan 385A–C); *Lonrho plc v Secretary of State for Trade and Industry* [1989] 2 All ER 609 diikut.]

Notes

For cases on recognition of trade unions, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1063–1080.

For cases on certiorari and mandamus, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 228–233.

Cases referred to

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (refd)

Lonrho plc v Secretary of State for Trade and Industry [1989] 2 All ER 609 (folld)

Padfield v Minister of Agriculture Fisheries and Food [1968] AC 997 (refd)

Tan Tek Seng v Suruhanjaya Pendidikan [1996] 1 MLJ 261 (refd)

Legislation referred to

Federal Constitution arts 5, 8, 10

Industrial Relations Act 1967 s 9(3), 9(4C), 9(5)

Trade Unions Regulations 1959 reg 65(1), 65(2)

Appeal from: Originating Motion No R2–25–20–94 (High Court, Kuala Lumpur)

Ahmad Kamal bin Md Shahid (Senior Federal Counsel) for the appellants in Civil Appeal No W–01–45–1995.

VT Nathan (*Rutheran Sivagnanam* with him) (*Shearn Delamore & Co*) for the appellant in Civil Appeal No W–02–418–1995.

Tommy Thomas and *Mubashir Mansor* (*Skrine & Co*) for the respondent in both appeals.

3 July 1997

Gopal Sri Ram JCA (delivering the oral judgment of the court): There are two appeals before us. Both are brought against the same decision of the High Court in Kuala Lumpur. In the first appeal the appellants are the Minister of Human Resources ('the Minister'), the Director General of Industrial Relations ('the DGIR') and the Director General of Trade Unions ('the DGTU'). In the second appeal the appellant is CDL Hotels (M) Sdn Bhd which is the owner of a hotel in Kuala Lumpur called 'The Regent'. We will, for convenience, refer to the appellant in the second appeal simply as 'the Hotel'. The common respondent to both appeals is the National Union of Hotel, Bar and Restaurant Workers of Semenanjung Malaysia ('the Union'). It is common ground that several employees of the Hotel are, and were at all material times, members of the Union.

The Union wanted to represent, in collective bargaining, such of its members who were employed by the Hotel in order to negotiate and

A conclude the terms and conditions of their employment with the Hotel. It could not do so unless and until it received recognition from the Hotel. In order to obtain recognition, it had to demonstrate that it represented a majority of the Hotel's workmen. The expression 'majority' in this context, in accordance with settled industrial practice, refers to 50% and one of the Hotel's workmen. In due course, the Union took steps to obtain recognition for itself.

On 9 March 1993, it prepared and submitted Form A to the Hotel as prescribed by the Industrial Relations Regulations 1980. The Hotel had a choice on receiving this form. It could either grant the recognition sought or resort to the procedure set out in s 9(3) of the Industrial Relations Act 1967 ('the Act'). The Hotel decided to follow the latter course.

On 29 March 1993, it wrote to the DGIR requesting for a secret ballot to be held. That letter was copied to the Union. Then on 19 May 1993 the DGIR wrote to the DGTU requesting the latter to carry out a membership check for the purpose of determining the percentage of the Union's membership among the workmen of the Hotel in respect of whom recognition was sought. On 8 June 1993 the DGTU wrote to the Union and the Hotel to inquire which method the parties proposed in order to make the determination. It is, we think, useful at this stage to say a word or two about the methods prescribed by the Trade Unions Regulations 1959 ('the Regulations').

Regulation 65 of the Regulations prescribes two methods by which membership is to be ascertained. That regulation is in the following terms:

> 65 Formula to ascertain percentage of membership
>
> (1) In the case of a membership verification exercise, the percentage of membership shall be calculated according to the following formula:
>
> $$\frac{\text{total number of valid members as at the date of claim}}{\text{total number of workmen in respect of whom recognition is being sought as at the date of claim}} \times 100\%$$
>
> (2) In the case of a secret ballot, the percentage of membership shall be calculated according to the following formula:
>
> $$\frac{\text{number of votes indicating membership}}{\text{number of workmen entitled to vote}} \times 100\%$$

The next event took place on 23 June 1993. On that date, the Union wrote to the DGTU informing him that it wanted to have the percentage of its membership with the Hotel ascertained by means of a membership verification exercise. The reason advanced by the Union for its request was that 40 of its members had resigned from the Hotel making it difficult for the Union to locate them.

On 6 July 1993 the DGTU wrote to the Union and the Hotel informing them that he had decided to make his determination by means

of a secret ballot as prescribed by reg 65(2). He, however, did not advance any reasons for his choice. A

On 28 July 1993, the DGTU consulted representatives from both the Union and the Hotel, and, on 30 July 1993 issued a notice to the parties stipulating 26 August 1993 as the date on which the secret ballot would be conducted at the premises of the Hotel. The secret ballot was conducted on 26 August 1993 in the presence of representatives of both parties, with the Union representative entering a protest. The secret ballot revealed that 277 votes had been cast, of which 6 were spoilt: 244 votes were in favour of Union representation while 27 were against such representation. Applying the formula prescribed by reg 65(2), the percentage produced by the secret ballot was 37.48%. This was, of course, insufficient to support the Union's claim for recognition. After obtaining the result, the DGTU inquired of the Hotel whether it intended to recognize the Union. Unsurprisingly, the Hotel declined. B C

Then, on 8 October 1993, the Union wrote to the Minister asking him to give his decision upon the matter. The DGTU, acting under s 9(4C) of the Act, also notified the Minister, as the question of recognition had not been resolved. The Minister, acting under s 9(5) of the Act gave his decision on 16 February 1994. He rejected the Union's claim for recognition. The Union was dissatisfied with the Minister's decision. It applied for an order of certiorari to quash that decision and for a mandamus, inter alia, directing the Minister, the DGIR and the DGTU to conduct a membership verification exercise under reg 65(1). D E

The learned judge who heard the application granted the order. He did so principally on the ground that the DGTU had not given reasons for selecting the secret ballot method in order to make the determination. However, the learned judge rejected the Union's alternative submission that reg 65(2) was ultra vires the Trade Unions Act 1959 and therefore void. Before proceeding any further, we wish to express our agreement with his conclusion on this point. In our judgment reg 65(2) is not ultra vires the Trade Unions Act 1959. F

In this court, Mr T Thomas, counsel for the Union, sought to argue that reg 65(2) in any event provided for an unfair procedure. He said that in the light of the jurisprudence that has developed over the last year or two, the impugned provision ought to be struck down as offending arts 5, 8 and 10 of the Federal Constitution. Now, this is a serious argument. It is a matter upon which mature argument and consideration are called for. It is a point on which we would have liked to have had the learned judge's views. But it was never argued before him. We are therefore deprived of the benefit of the learned judge's opinion on the matter. In accordance with settled principles that govern the taking of fresh points not canvassed at first instance, we respectfully decline therefore to enter upon a consideration of this argument. G H I

We now turn to the arguments of the appellants. It was submitted both by En Ahmad Kamal, Senior Federal Counsel appearing on behalf of the appellants in the first appeal and Mr VT Nathan of counsel for the

A Hotel that the learned judge had fallen into error in the approach that he took in the case. We do not think that we do any injustice to counsel before us if we summarize their submissions in support of the appeal as follows:

(1) The decision of the DGTU to make his determination by resorting to the method prescribed by reg 65(2), was not tainted with what it has
B come to be known as 'Wednesbury unreasonableness'. It was an entirely reasonable decision.

(2) The judge was wrong in striking down the Minister's decision merely because the DGTU had failed to give reasons for making the choice that he did. The duty to give reasons and the legitimate expectation
C for such reasons or the failure to give reasons are relevant only where the decision itself is unreasonable. But where the decision is in itself reasonable, these are irrelevant matters.

(3) The decision in this case was reasonable because there is nothing to show, evidentially speaking, that the result would have been any
D different, and in the Union's favour, if the membership verification exercise method prescribed by reg 65(1) had been adopted. Even if one were to take into account the 40 members mentioned by the Union in its letter to the DGTU, the required majority would still have not been obtained to warrant recognition.

E So much for the arguments in support of the appeals.

In opposing the appeal, Mr Thomas has argued that the formula prescribed by reg 65(2) when applied to the facts of the present case produced an unjust and unfair result. Resorting to the method prescribed by reg 65(1) would have produced a fairer result. In these circumstances, the DGTU ought to have explained why he decided to adopt the second
F method prescribed by reg 65 rather than the first. Since neither the DGTU nor the Minister gave any reasons, it must be assumed in the circumstances, that they had no good reasons for choosing a method that produced an incongruous and unfair result. The learned judge, Mr Thomas argued, was entirely correct in making the order that he did.

G Having heard counsel for the better part of two days — yesterday and the day before — and having given this matter our most anxious consideration, we must express our regret at being unable to agree with Mr Thomas' arguments. We are in entire agreement with the submissions made on behalf of the appellants before us.

H There is, in our judgment, on the facts of this case, no unfair or unjust result by the application of the method prescribed by reg 65(2). As pointed out by Senior Federal Counsel and Mr Nathan, even if the votes of the 40 members who had left had been taken into account, no favourable result would have been produced to the Union. In our judgment, the workmen employed by the Hotel were entitled to exercise their franchise
I or to refrain from exercising it as they chose to. It was for them to decide whether the Union ought to represent them in the Hotel. In a democracy like ours, one of the most valuable rights is the right to vote as well as the right to withhold one's vote. Viewed from this broader perspective and

taking into account a workman's right enshrined in arts 5, 8 and 10 of the Federal Constitution, it is clear that there was no unreasonable decision in the *Wednesbury* sense in this case.

To remind ourselves, the '*Wednesbury* unreasonableness' test, restated by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at p 410 is as follows:

> By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness' (*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. 'Irrationality' by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

In our judgment the decision in the present case does not come within the test formulated in the above quoted passage.

It is axiomatic that a reasonable decision may often produce a result that is adverse to one or more parties who are affected by it. An unfair result does not necessarily make a decision unreasonable because unfairness must be gauged by reference to the decision itself, which may or may not include the consequences of such decision, depending upon the circumstances of each case.

On the facts of the present case, the DGTU left it to the Hotel's workmen to decide whether they wished the Union to represent them in collective bargaining. The workmen announced their decision in a democratic fashion. The decision of the DGTU is therefore, when viewed against the facts of this case, not unreasonable.

The learned judge citing *Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997 held that the absence of reasons in the present case concluded the matter in the Union's favour. In our judgment the learned judge having cited the correct law misapplied it to the facts before him. This is apparent from the fact that although he quoted a passage from the speech of Lord Keith of Kinkel in *Lonrho plc v Secretary of State for Trade and Industry* [1989] 2 All ER 609 to the following effect:

> The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker who has given no reasons cannot complain if the court draws the inference that he had no rational reason for his decision

the learned judge nevertheless failed to give effect to the proposition, contained in that passage. He ought to have asked himself the question whether the decision was unreasonable in the sense in which the expression is understood in administrative law. Having done so, and if he had given an affirmative answer, then, and then only, ought he to have proceeded to consider the materiality or relevance of the failure on the part of the decision maker to provide reasons. Since the learned judge did not adopt this approach, but in fact adopted quite the opposite approach, we must with respect hold that his conclusions have been fatally flawed by a misdirection on his part.

Mr Thomas argued that the secret ballot procedure, when applied to the circumstances of the case, defeats the right of the Union and infringes the wholesome doctrine encompassed in art 10 of the Federal Constitution. We respectfully do not agree. This is not a case where the workmen have been deprived of their right to livelihood or to be associated with others in their trade. This court in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ MLJ 481 has held that 'life' in art 5(1) of the Federal Constitution includes the right to livelihood. And we have in *Tan Tek Seng v Suruhanjaya Pendidikan* [1996] 1 MLJ 261 recognized the wide sweep of art 8(1) of the Federal Constitution and the beneficial effects that it confers upon citizens of this country.

But as we have just observed, none of these constitutional provisions has been infringed by the decision of the Minister or the DGTU in the present instance. The constitutional provisions referred to by Mr Thomas are therefore not relevant to the appeals before us.

For the reasons we have given, the appeal is allowed. The orders of certiorari and mandamus are set aside. The order for costs is also set aside. There will be no order as to costs here and in the court below. The deposit of the Hotel in Civil Appeal No 02–418–1995 is refunded. We direct counsel to attend before us tomorrow to consider the making of such consequential orders as are necessary in regard to the Minister's decision.

4 July 1997

In addition to the orders made on 3 July 1997, it is further ordered that all steps taken and decisions made after 19 June 1995 are quashed, including the Minister's order of recognition dated 9 December 1996.

Appeal allowed.

Reported by Kevin Ooi